



DEPAUL UNIVERSITY
UNIVERSITY LIBRARIES

DePaul Journal of Art, Technology
& Intellectual Property Law

Volume 12

Issue 1 *Spring 2002: The Recording Academy
Entertainment Law Initiative Legal Writing
Competition 2001-02*

Article 12

Neutralizing Media Bias Through the FCC

Amber McGovern

Follow this and additional works at: <https://via.library.depaul.edu/jatip>

Recommended Citation

Amber McGovern, *Neutralizing Media Bias Through the FCC*, 12 DePaul J. Art, Tech. & Intell. Prop. L. 217 (2002)

Available at: <https://via.library.depaul.edu/jatip/vol12/iss1/12>

This Legislative Updates is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

LEGISLATIVE UPDATE

NEUTRALIZING MEDIA BIAS THROUGH THE FCC

I. INTRODUCTION

“Stereotyping is one step beyond the initial stage of sheer invisibility that minorities have to move through on their way to even token representation.”¹

One of the most dominant influences on American society is television. Ninety-eight percent (98%) of American households have at least one television.² Sixty-seven percent (67%) have two or more televisions.³ The media, particularly television, plays a dominant role in our culture.

The entertainment and news media acts as a “window to the world” for Americans.⁴ Americans can view diverse images and viewpoints from around the world. But the media determines what American will watch and learn. The media has a heavy burden to ‘teach’ Americans. For example, with the power of television, newscasts can educate Americans on the misconceived notions of Islamic life; that most Arabs do not support the terrorist attacks on our country. Conversely, the media can bombard viewers with images of Arabic terrorism fueling the belief that Islam supports terrorism. Thus, the media is instrumental in enlightening Americans and promoting diversity, but may not take this responsibility as seriously as one would hope. Americans may not realize, remote in hand, how the media conforms programming for reasons

¹ Larry Cross, *Visibility and its Discontents*, at <http://www.glaad.org/org/publications/images/index.html?record=2614> (last visited at Oct. 30, 2001).

² People for Better TV (1999), at <http://www.bettertv.org/power.html> (last visited Oct. 23, 2001).

³ *Id.*

⁴ *Id.*

other than ‘the public interest.’ Television may unwittingly “distort perceptions and interfere with our ability to understand others in our society.”⁵

This article considers proposed legislation that, if passed, would attempt to alleviate minority stereotypes. The article will review the historical role that the FCC plays in regulating the broadcast industry’s role in diversity. It will provide the history of media bias in programming and activism among certain minorities. It will assess the external and internal impact of media bias and the impact that minority ownership and employment would have on programming. Finally, the article will consider the fate of the proposed legislation.

II. PROPOSED LEGISLATION

On August 1, 2001 Congressman Eliot Engel (D-N.Y.) introduced new legislation in the House of Representatives.⁶ The new legislation, H.R. 2700, was referred to the Committee on Energy and Commerce, then to the Committee on Technology and the Internet.⁷ Entitled “Ethnic, Minority, and Gender Bias Clearinghouse Act of 2001,” the legislation would amend the Communications Act of 1934.⁸ The legislation would result in a new Federal Communications Commission (FCC) office to field complaints about the media industry’s depiction and employment of ‘victims of media bias.’⁹ “The term ‘victims of media bias’ includes persons or groups who have been or may be discriminated against in their depiction or employment in broadcasting based on their race, ethnicity, religion, sex, sexual orientation, disability, age or other characteristic.”¹⁰ The new FCC office would track incidences of bias in both the news and entertainment industries.¹¹ The office would also track statistics on the employment of ‘victims of media

⁵ *Id.*

⁶ H.R. 2700, 107th Cong. § 5 (2001), *available at* <http://thomas.loc.gov>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ H.R. 2700, 107th Cong. § 5 (2001), *available at* <http://thomas.loc.gov>.

bias' in the news and entertainment industries.¹² The Act would require the office to conduct an annual conference to "focus public attention upon the images of victims of media bias . . . discuss the impact which these images have on such victims, and encourage the participation of such individuals and public and private organizations that serve the interests of such victims."¹³ In addition, the new office will make annual reports on their activities to Congress.¹⁴

The new legislation would give the FCC office no authority to "regulate or otherwise control the content of news or entertainment programming on radio, television, cable television, or in print media."¹⁵ Furthermore, the Act would be "in no way . . . intended to diminish the protection of free speech and the press guaranteed under the First Amendment of the United States."¹⁶ Mr. Engel did not offer Congressional remarks regarding the 2001 Act.

This is not the first time that Rep. Engel has introduced legislation establishing a federal government office to monitor how minorities are portrayed and employed in the broadcast media. On January 6, 1999, Rep. Engel introduced H.R. 125, cited as the "Ethnic and Minority Bias Clearinghouse Act of 1999."¹⁷ The bill was referred to the Committee on Commerce where it remains inactive in the Subcommittee on Telecommunications, Trade, and Consumer Protection.¹⁸

Mr. Engel introduced the 1999 Act "in support of greater diversity in our national media."¹⁹ Mr. Engel reasoned that "the media has a tremendous influence in our day-to-day lives. The impact of this 'Information Age' influence needs to be examined because it does not always promote accurate images."²⁰ Furthermore, Mr.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ H.R. 2700, 107th Cong. § 5 (2001), available at <http://thomas.loc.gov>.

¹⁷ H.R. 125, 106th Cong. § 5 (1999), available at <http://thomas.loc.gov>.

¹⁸ *Id.*

¹⁹ *Supporting the Ethnic and Minority Bias Clearinghouse Act of 1999*, 106th Cong. E1961 (statement of Hon. Eliot L. Engel).

²⁰ *Id.*

Engel introduced to Congress a letter written by Frank Guarini, Chairman of the National Italian American Foundation (NIAF),²¹ to the Academy of Television Arts and Sciences in support of the legislation.²² Guarini expressed the NIAF's concern about the negative exploitation of Italian Americans in the media.²³ He warned that a show like HBO's "The Sopranos," "reinforces the stereotype that all Italian Americans are losers, or mobsters, or both."²⁴ Quoting Energy Secretary, Fredrico Pena, Guarini argued that such stereotyping "is the package in which racism finds a home...we depersonalize each other and we see not the facts of the personal stories we can all share but the face of an impersonal group."²⁵ Guarini states NIAL's support of the 1999 Act for its attempt to remedy the media industry's unwillingness to reduce the stereotyping of Italian Americans and other minorities.²⁶

In his remarks to the House of Representatives, Mr. Engel clarified the scope of the legislation. "While this legislation will shed a good deal of sunshine upon our media, it will not attempt to place any mandates upon broadcasters."²⁷

H.R. 2700, the "Ethnic, Minority, and Gender Bias Clearinghouse Act of 2001" is a modification of H.R. 125, the "Ethnic and Minority Bias Clearinghouse Act of 1999." In addition to adding 'GENDER' as a minority group, Mr. Engel modified the 2001 Act in two respects.²⁸ First, the newly created FCC office will have the additional function of tracking statistics on the employment of 'victims of media bias' in the news and entertainment industries.²⁹ This additional function broadens the focus from not only onscreen

²¹ See <http://www.naif.org> ("NAIF is a non-profit organization dedicated to preserving the heritage of an estimated 20 million Americans of Italian descent, the nation's fifth largest ethnic group").

²² *Supporting the Ethnic and Minority Bias Clearinghouse Act of 1999*, 106th Cong. E1961 (statement of Hon. Eliot L. Engel).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Supporting the Ethnic and Minority Bias Clearinghouse Act of 1999*, 106th Cong. E1961 (statement of Hon. Eliot L. Engel).

²⁸ H.R. 2700, 107th Cong. § 5 (2001), available at <http://thomas.loc.gov>.

²⁹ *Id.*

stereotyping of minority groups, but to off screen employment of those groups as well.³⁰ Second, the 2001 Act adds a ‘Savings Provision.’³¹ Unlike the 1999 Act, the provision manifests the new FCC office’s restriction from regulation or content control of news and entertainment programming.³² The provision affirms the “protection of free speech and press guaranteed under the First Amendment”³³

Mr. Engel did not comment on the reasons for the 2001 Act. The 2001 Act evolved from the 1999 Act. Hence, the Mr. Engel’s remarks supporting the initial Act most likely relate to this new legislation as well.

III. HISTORICAL OVERVIEW OF THE FCC AND BROADCAST REGULATION

The “Ethnic, Minority, and Gender Bias Clearinghouse Act of 2001” (hereinafter, the “Act”) establishes a new office for the FCC to monitor the depiction and employment of victims of media bias.³⁴ The FCC has played a prominent role in the welfare of minority groups in the news and entertainment industry in order to achieve the public interest goal of diversity of programming. Supreme Court decisions have established that “fostering diversity of viewpoints is a goal encompassed by the Commission’s public interest mandate.”³⁵ The FCC defines diverse programming as “programming that airs different points of view and reflects the needs and interests of all sectors of the community, including minorities and women.”³⁶ The Act would accentuate this function.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ H.R. 2700, 107th Cong. § 5 (2001), available at <http://thomas.loc.gov>.

³⁴ *Id.*

³⁵ *In the Matter of Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, 15 FCC Rcd 2329, 2366. See, e.g., *National Citizens Committee*, 436 U.S. at 795-800; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Community Television of Southern California v. Gottfried*, 459 U.S. 498 (1983).

³⁶ *Id.* at 2360.

However, Congress and the courts have monitored the functions of the FCC to achieve a diversity of viewpoints. Broadcast regulation must serve the ‘public interest’ without too much government interference. In order to appreciate the establishment of the new FCC office and the limited functions it would serve, one must understand the FCC’s role in broadcast regulation since its conception.

A. The Creation and Purpose of the FCC

The federal government has been in the television and radio regulation business since the early 1900’s.³⁷ Congress established the Radio Act of 1912, requiring radio operators to obtain a license from the Secretary of Commerce and Labor.³⁸ Congress broadened the regulatory framework over broadcasters with the Radio Act of 1927.³⁹ The 1927 Act set up the Federal Radio Commission to regulate broadcasters.⁴⁰ The 1927 Act “embodied, for the first time, the concept that the airwaves were public property and that a license would be granted only ‘as public convenience, interest, or necessity requires.’”⁴¹

Congress enacted the Communications Act of 1934, creating the Federal Communications Commission (FCC) to supercede the Federal Radio Commission.⁴² The Communications Act of 1934 “created a public system of permits and licenses governing commercial broadcasting.”⁴³ The 1934 Act retains the following the-

³⁷ See generally *NBC v. United States*, 319 U.S. 190, 210-214 (1943) (describing the history of federal regulation of airwaves).

³⁸ See Radio Act of 1912, ch. 287, 37 Stat. 302, repealed by Radio Act of 1927, ch. 169, 39, 44 Stat. 1162, 1174, repealed by Communications Act of 1934, ch. 652, 602(a), 48 Stat. 1064, 1102.

³⁹ See Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927).

⁴⁰ *Id.*

⁴¹ Patricia M. Worthy, *Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue*, 18 HASTINGS COMM. & ENT. L. J. 509, 519 (1996) (quoting The Radio Act of 1927, ch. 169, § 1, 44 Stat. 1162 (1927)).

⁴² See Communications Act of 1934, 47 U.S.C. §151 (1988).

⁴³ Patricia M. Worthy, *Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue*, 18 HASTINGS COMM. & ENT. L. J. 509, 519 (1996).

ory:

The public owns the airwaves used by the broadcasters to send news and entertainment programming. The broadcasters get the license for free. The government protects the broadcasters exclusive use of the frequencies they are assigned. In return for this free use and free protection, the broadcasters are supposed to serve the 'public interest.'⁴⁴

Ideally, broadcasters have a fiduciary duty to serve the public through their programming. The FCC is responsible for regulating "interstate and foreign communications services so that they are available, so far as possible, to all people of the United States, without discrimination on the basis of race, religion, national origin, or sex"⁴⁵ Specifically, the FCC regulates the airwaves to ensure that broadcasters are committed to serving the "public interest, convenience, and necessity" in operating their stations and choosing their programming.⁴⁶

B. FCC Regulation to Promote Diversity

The FCC regulates broadcasters through the "public interest, convenience, and necessity" standard.⁴⁷ To comply with this standard, the FCC imposes content-neutral regulations upon broadcasters.⁴⁸ For example, broadcasters "must operate within clearly defined limits governing transmitter power, antenna height, signal contour, location, and frequency."⁴⁹ However, the FCC must extend its content-neutral regulations to further an important compo-

⁴⁴ *The Public and TV: Viewer and Citizen*, People for Better TV (1999), at <http://www.bettertv.org/citizen.html> (last visited Oct. 23, 2001).

⁴⁵ 47 U.S.C. § 151, as amended (1997).

⁴⁶ 47 U.S.C. § 303, 309(a).

⁴⁷ 47 U.S.C. § 303, 309(a).

⁴⁸ Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CALIF. L. REV. 1687, 1693 (1997).

⁴⁹ *Id.*

ment of the ‘public interest’ standard. Diversity is a fundamental component of the public interest standard.⁵⁰ The FCC fosters the belief that public interest not only entails content-neutral regulations, but also that the public has the right to “a diversity of views and information over the airwaves.”⁵¹

In *Associated Press v. United States*, the FCC held that diverse programming is a constitutionally guaranteed right of the public.⁵² The spectrum of airwaves limits the number of broadcast licenses which the must regulate.⁵³ The regulation of broadcast licenses is necessary to achieve the goal of diversity. This regulatory scheme is primarily based on the ‘scarcity’ theory.⁵⁴ There are more potential broadcasters than frequencies available on the airwave spectrum.⁵⁵ This limitation of frequencies facilitated regulations to assign particular frequencies to particular broadcasters.⁵⁶

FCC regulation based on the scarcity theory was upheld in *Red Lion Broadcasting Co. v. FCC*.⁵⁷ In *Red Lion*, the Supreme Court held that the FCC did not violate the First Amendment in requiring a radio or television station give rely time to a candidate subject to a political attack.⁵⁸ The Court reasoned that “it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . .”⁵⁹ The Court expressed that, “there are substantially more individuals who want to broadcast than there are frequencies to allocate . . . because of the scarcity . . . the Government is permitted to put restraints on licenses in favor of others whose views should be expressed on this unique

⁵⁰ Thomas G. Krattenmaker & Lucas A. Powe, Jr., *Regulating Broadcast Programming* 74 (1994).

⁵¹ *Metro Broadcasting Inc., v. FCC*, 497 U.S. 547, 567 (1990) (quoting *FCC v. National Citizens Comm. For Broad.*, 436 U.S. 775, 795 (1978)).

⁵² *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (upholding the application of antitrust laws to commercial practices in the mass media over a First Amendment objection).

⁵³ Logan, *supra* note 48, at 1689.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

⁵⁸ *Id.*

⁵⁹ *Id.* at 390.

medium.”⁶⁰ Thus, due to the uniqueness of the physical limitations of the airwaves, the FCC has broader regulation over broadcasters than any other media.

In 1994, the Supreme Court decided that the broadcast regulation based on the scarcity rationale should not apply to cable regulation.⁶¹ In *Turner Broadcasting, Inc. v. FCC*,⁶² Turner challenged the ‘must-carry’ requirements for cable systems to carry localized broadcast channels.⁶³ The Court stated the unique physical limitations of the broadcast medium and the need for a distinct approach to this medium.⁶⁴ However, the Court held that the lower level of First Amendment protection applied to broadcast regulation should not apply to the cable industry.⁶⁵ The Court held that “cable television does not suffer from the inherent limitations that characterize the broadcast medium.”⁶⁶ In a subsequent appeal, however, the Court upheld the must-carry provisions as narrowly tailored to further important government interests.⁶⁷

C. Limits to FCC Program Regulation Beyond the Scarcity Rationale

“Aside from scarcity, a number of reasons have been offered to justify at least some degree of regulation of broadcast speech. The Supreme Court itself has justified restrictions on the broadcast of indecent programming on grounds other than scarcity.”⁶⁸ A certain number of programming requirements exist that broadcast licensees must adhere to for assurance of license renewal. For instance, FCC rules that seek to encourage certain types of programming or access still remain. There are still requirements that affirmatively seek to promote ‘public interest’ programming

⁶⁰ *Id.* at 388-90.

⁶¹ *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994).

⁶² *Id.* at 2457.

⁶³ *Id.* at 2445.

⁶⁴ *Id.*

⁶⁵ *Id.* at 2457.

⁶⁶ *Id.*

⁶⁷ *Turner Broadcasting System, Inc. v. FCC* 117 S. Ct. 1174 (1997).

⁶⁸ Logan, *supra* note 48 at 1705.

by requiring that broadcasts air programming responsive to the needs and interests of their local communities.⁶⁹ The Children's Television Act (CTA) that promotes the broadcast of children's educational programming is an example of one of these.⁷⁰

FCC rules also restrict certain types of programming. FCC regulations prohibit the broadcast of obscene speech.⁷¹ The FCC restricts the airing of 'indecent' programming.⁷² "Indecency" is defined as material that depicts, "in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience."⁷³ Additionally, programming deemed 'violent' is also restricted. Under the Telecommunications Act of 1996, the FCC can mandate the 'V-Chip,' a device placed in television for parents to reject "programming that contains sexual, violent, or other indecent material."⁷⁴

Additionally, the FCC regulates programming restrictions designed to "protect consumers or promote public safety."⁷⁵ Some of these restrictions include the 'sponsorship identification' rule "requiring identification of entities sponsoring broadcast matter for valuable consideration; "the 'broadcast hoax' rule" prohibiting licensees from knowingly broadcasting false crime information that would lead to harm; "the statutory prohibition against cigarette and smokeless tobacco advertising; . . . and a policy against the deliberate rigging, staging, or distortion of a significant news event."⁷⁶

⁶⁹ See 47 C.F.R. §73.3526(a)(8) & (9) (1996).

⁷⁰ 47 U.S.C. §394 (1990).

⁷¹ See 18 U.S.C.A. §1464 (West Supp. 1997).

⁷² FCC v. Pacifica Found., 438 U.S. 726, 731-32 (1978) (upholding restrictions on indecent speech in the broadcast medium).

⁷³ *Id.*

⁷⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, 551(b)(1), 110 Stat. at 140.

⁷⁵ Logan, *supra* note 48, at 1696.

⁷⁶ *Id.* at 1705.

D. FCC Regulation 'Behind the Scenes' to Promote Diversity

Because diverse programming is considered a public right, the FCC has regulated broadcasting to give the public the "widest possible dissemination of information from diverse and antagonistic sources."⁷⁷ To achieve this, the FCC has confronted the theory that enhancing diversity behind the camera will enhance the diversity of programming.

Lack of minority ownership in the broadcast industry has historically been an issue among minority groups. The issue is the same today. The Commerce Department recently released a report on minority ownership.⁷⁸ The report stated that "the number of TV stations owned by minorities has dropped to the lowest level in more than a decade."⁷⁹ Furthermore, concerns have intensified with the passage of the Telecommunications Act of 1996, easing media ownership rules and allowing chains to buy out smaller operators.⁸⁰

Initially, the FCC primarily focused their diversity policy on minimizing broadcast media ownership concentrations to assure a dissemination of diverse viewpoints. "However, as a result of the racial disturbances of the late 1960's and the findings of the Kerner Commission, the FCC initiated race-neutral regulatory policies that sought to ensure the inclusion of minority viewpoints in broadcast media."⁸¹ The FCC embraced the theory that including more minorities behind the camera would achieve enhanced minority viewpoints on camera.⁸² However, FCC policies in promoting diversity were challenged by the courts.

In *Metro Broadcasting, Inc. v. FCC*, two FCC policies were

⁷⁷ *Associate Press v. United States*, 326 U.S. 1, 20 (1945).

⁷⁸ Paula Bernstein and Pamela McClintock, *FCC Minority Regs Nixed*, DAILY VARIETY, Jan. 17, 2001, at 1.

⁷⁹ *Id.*

⁸⁰ STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 716 (2001).

⁸¹ Patricia M. Worthy, *Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue*, 18 HASTINGS COMM. & ENT. L. J., 509, 523 (1996).

⁸² *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

challenged.⁸³ The first policy promoted minority ownership in review proceedings for new broadcasting licenses.⁸⁴ The second policy permitted that minority-owned radio and television broadcast stations could only be reallocated to other minority-owned firms.⁸⁵ The FCC defended the two policies by arguing a legitimate nexus between race and expression existed, therefore the licensing scheme was consistent with its duty “to achieve the public interest in programming content without direct content regulation.”⁸⁶ The Supreme Court upheld both FCC policies encouraging minority ownership of broadcast licenses.⁸⁷ The Court reasoned that the policies advanced important First Amendment interests.⁸⁸ The court held that the program was an acceptable measure in remedying past discrimination and diversifying programs.⁸⁹ “The interest in enhancing broadcast diversity is, at the very least, an important governmental objective . . . The diversity of views and information on the airwaves serves important First Amendment values . . . The benefits redound to all members of the viewing and listening audience.”⁹⁰

The *Metro Broadcasting* holding did not last long. In *Adarand Constructors, Inc. v. Peña*, the Supreme Court rejected *Metro Broadcasting*’s minority enhancing programs.⁹¹ The Court reasoned that congressional programs must be held to strict scrutiny like state and local programs.⁹² The Court held that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court order un-

⁸³ *Id.*

⁸⁴ *Id.* at 556-7.

⁸⁵ *Id.* at 557.

⁸⁶ *Id.* at 556-7.

⁸⁷ *Id.*

⁸⁸ *Metro Broadcasting*, 497 U.S. at 556-7.

⁸⁹ *Id.*

⁹⁰ *Id.* at 567-8.

⁹¹ *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995). (In *Adarand*, the FCC ruled that the church violated the Commission’s equal employment opportunity by using religious hiring preferences and because its recruitment of minority employees was inadequate.)

⁹² *Id.*

der strict scrutiny.”⁹³ Under this standard, the FCC must use statistics to prove past discrimination and that any program implemented is narrowly tailored to rectify that past discrimination.⁹⁴ The Court ultimately concluded that “*Metro Broadcasting* was . . . a significant departure from much of what had come before it” and that “well-settled legal principles pointed toward a conclusion different from the one reached in *Metro Broadcasting*.”⁹⁵

In April 1998, the U.S. Court of Appeals for the District of Columbia Circuit faced deciding the constitutionality of the Commission’s Equal Employment Opportunity (EEO) guidelines.⁹⁶ The court in *Lutheran Church-Missouri Synod v. FCC*,⁹⁷ met an *Adarand*-based challenge concerning the EEO.⁹⁸ FCC regulations forbid discrimination by licensees “because of race, color, religion, national origin or sex,” and required licensees to adopt affirmative action plans to attract people of color and women.⁹⁹ In defending the regulation against the Equal Protection Clause, FCC argued that the regulations were necessary to achieve its objective of fostering diverse programming content.¹⁰⁰ The court ruled in favor of Lutheran Church, holding that the FCC could not precisely define how the regulations would promote broadcast diversity.¹⁰¹ The court reasoned that, under *Adarand*, the strictest necessity could justify any sort of government-compelled, race-based classification and the EEO rules would have to be narrowly tailored to serve the compelling government interest.¹⁰² The court held that the FCC’s definition was “amorphous” and that it was “impossible to conclude that the government’s interest, no matter how articulated is a compelling one.”¹⁰³ It held that the FCC’s practice of comparing a

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 2113-16.

⁹⁶ *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 356 (D.C. Cir. 1998).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 350.

¹⁰¹ *Id.*

¹⁰² *Lutheran Church*, 141 F.3d at 350.

¹⁰³ *Id.* at 354-5.

station's work force with the racial composition of its market was illegal.¹⁰⁴ The court struck down the policy because it forced stations into the hiring of minorities almost creating a minority-hiring quota.¹⁰⁵

On January 20, 2000, the FCC adopted a report and order revising the Equal Employment Opportunity (EEO) guidelines to comply with the holding in *Lutheran Church*.¹⁰⁶ The new broadcast EEO rule and modified EEO rules for cable entities adopted emphasized outreach in recruitment to all qualified job candidates and banned discrimination on the basis of race, color, national origin or gender.¹⁰⁷ The new rules clearly indicated that race or gender should not be considered in particular hiring decisions.¹⁰⁸

With their adoption of the revised EEO, the Commission excluded direct statistical quotas or benchmarks in favor of open-ended recruiting policies and reporting obligations to track these efforts.¹⁰⁹ The revised rules strengthened the FCC's anti-discrimination stance and stress open hiring to every qualified person in television, radio and cable.¹¹⁰ They allowed broadcasters to "widely disseminate information about job openings to all segments of the community to ensure that all qualified, including minorities and women, have sufficient opportunities to compete for jobs in the broadcast industry. The new rules did not require broadcasters to hire any particular applicant, nor do they place

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Ronald J. Krotoszynski, Jr. & A. Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813, 824 (2000); see also Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rule and Policies and Termination of the EEO Streamlining Proceeding, 15 F.C.C.R. 2329 (2000) (report and order).

¹⁰⁷ 15 F.C.C.R. 2329 (2000).

¹⁰⁸ *Id.*

¹⁰⁹ Ronald J. Krotoszynski, Jr. & A. Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813, 824 (2000).

¹¹⁰ People for Better TV, *FCC Adopts New Equal Employment Opportunity (EEO) Rules*, at <http://www.bettertv.org/eo.htm> (last visited Oct. 23, 2001).

pressure on such decisions.”¹¹¹ In essence, the new rules were “designed to ensure that TV, radio and cable systems cast a wide net when filling vacancies.”¹¹²

The FCC currently requires all broadcasters, including cable, to file annual employment reports.¹¹³ The *Lutheran Church* court had previously suspended the requirement of broadcaster employment reports.¹¹⁴ Under the proposed act, the FCC would use the reports to track employment trends in the industry and to inform Congress of such trends.¹¹⁵

The 2001 Act would focus not only on employment trends, but on minority depictions as well.¹¹⁶ The Act would highlight demeaning stereotypes of minority groups.¹¹⁷ This Act suggests a need for government action where voluntary actions by the broadcast industry fail. Since some stereotypes are deemed unconscionable long after they are depicted in the media nationwide, the Act stresses these stereotypes in the present tense.

IV. HISTORY OF MEDIA BIAS

The proposed legislation would highlight the predominant image of different groups as portrayed in the media.¹¹⁸ Such evidence of stereotypical depictions of minority groups can be revealed in past and present media outlets, including in television shows and on film. This section will explore the history of the depiction of minority groups and how those groups have attempted to prevent such stereotypes from perpetuating our culture.

The depiction of African-Americans in film has been a controversial issue since at least 1915, the year that filmmaker D.W.

¹¹¹ *Id.*

¹¹² *FCC Plan Eases Affirmative Action Rules; Proposal Wouldn't Require the Hiring of Minorities*, ST. LOUIS POST-DISPATCH, Nov. 20, 1998, at A13.

¹¹³ *FCC Adopts New Equal Employment Opportunity (EEO) Rules*, *supra*, note 108.

¹¹⁴ *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998).

¹¹⁵ *Id.*

¹¹⁶ H.R. 2700, 107th Cong. § 5 (2001), available at <http://thomas.loc.gov>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

Griffith produced his epic film *Birth of a Nation*.¹¹⁹ The film depicted blacks as “mammies and buffoons” with animal-like traits which played up to racist beliefs for over fifteen years.¹²⁰ Even the most liberal film critics, though acknowledging the film’s racism, praised the film for its technical and artistic merits.¹²¹ The NAACP opposed the film.¹²² The NAACP succeeded in convincing the censorship board to remove scenes of the film in New York and temporarily banning the film in Chicago.¹²³ Similarly, in 1951, the NAACP began a campaign to halt the television broadcast of *Amos and Andy*, a show depicting African-Americans as “lazy, scheming, and stupid,” which finally succeeded in 1966.¹²⁴ In the past decades roles for African Americans have broadened, but stereotypes and negative images are still prevalent.

Historically, Arabs have been depicted in stereotypical roles. “Arabs were pictured as wealthy sheiks and desert lovers who embraced polygamy and treated their women badly. Stereotyping Arabs as womanizers receded in the late 1970s, only to be replaced by the terrorist frenzy.”¹²⁵ The ‘terrorist frenzy’ has come in the most recent years, where Arabs and Muslims have been highly stereotyped as the perceived enemy.¹²⁶ After the 1993 World Trade Center bombing and Embassy bombings overseas, Arabs and Muslims are portrayed as “religious fanatics and crazed terrorists.”¹²⁷ Islamic and Arab-American groups like the Arab-

¹¹⁹ DAVID LEVERING LEWIS, W.E.B. DUBOIS: BIOGRAPHY OF A RACE 506-7 (1993).

¹²⁰ Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1265 (1992).

¹²¹ CATHERINE SILK & JOHN SILK, RACISM AND ANTI-RACISM IN AMERICAN POPULAR CULTURE, 128 (1990).

¹²² *Id.*

¹²³ Lewis, *supra* note 116, at 506-7.

¹²⁴ Gary Williams, “Don’t Try to Adjust Your Television, I’m Black:” *Ruminations on the Recurrent Controversy over the Whiteness of TV*, 4 J. GENDER RACE & JUST. 99, 101 (2000).

¹²⁵ Mohamed El-Bendary, *Muslims are Being Stereotyped Unfairly as Terrorists*, WASH. TIMES, Dec. 8, 1998, at A16.

¹²⁶ *Id.*

¹²⁷ *Id.*

American Anti-Discrimination Committee, have expressed outrage in recent years not only on television, but movies like “The Seige.”¹²⁸ The movie “blatantly depict[ed] Arabs as violent and fanatical, displaying their religion as an ancient, backward, barbarous institution hell-bent on pitting themselves against the West.”¹²⁹

Television has not only been faulty with its depiction of racial groups, the discrimination also extends to gays. Television’s history of gays began with characters depicted as one-dimensional and “generally destructive to themselves or others.”¹³⁰ Once the gay pride movement of the 1960’s and 1970’s strengthened, activist groups started complaining about the stereotypes.¹³¹ Gay characters were only acceptable “if they’re funny and clownish and celibate.”¹³² Gay characters have not been diversely characterized, but rather pigeon-holed as the ‘wacky gay person.’¹³³ Ron Cowan, co-producer and writer of the gay Showtime series “Queer as Folk” condones the fear of the honest depiction of gays on television as “internalized homophobia.”¹³⁴

By the late 1990’s gays became more familiar on TV as gay-related issues became a regular category of news.¹³⁵ “Gay rights organizations closely monitor the media to ensure that gay men and lesbians are not portrayed in stereotypical or negative terms.”¹³⁶ “The Gay & Lesbian Alliance Against Defamation (GLAAD) actively lobbies networks, studios, producers and sponsors to secure fair, accurate and inclusive representation . . . in all

¹²⁸ *Hollywood Fantasies Dangerous to Reality*, MINN. DAILY, Nov. 11, 1998.

¹²⁹ *Id.*

¹³⁰ Steve Johnson, *On the Gaydar; Showtime’s Hard-Hitting ‘Queer as Folk’ is Another Milestone for Gays on-TV*, CHI. TRIB., Nov. 30, 2000, at Tempo p. 1.

¹³¹ *Id.*

¹³² *Id.* (quoting David Lipman, executive producer and lead writer, *Queer as Folk*).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *See generally*

<http://www.glaad.org/publications/images/index.html?record=2614>.

¹³⁶ Nancy J. Knauer, *Simply So Different: The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of America v. Dale*, 89 KY. L. J. 997, 1058 (2001).

media to increase public awareness and allow viewers to form their own conclusions on lesbian, gay, bisexual and transgender issues.”¹³⁷

A. Measures to Prevent Media Bias

In 1967, President Lyndon B. Johnson spearheaded the Kerner Commission to report on minority depictions in the civil disturbances coverage of the 1960’s.¹³⁸ The Commission concluded that the media failed to depict minority aggravations deriving from the disturbances.¹³⁹

In 1977, the United States Commission on Civil Rights issued a report expressing the continued concerns with the portrayal of women and people of color.¹⁴⁰ Entitled *Window Dressing on the Set: Women and Minorities in Television*, the report held that “throughout the early history of television programming, minorities were excluded from the screen except for certain stereotyped roles in programs of a particular type.”¹⁴¹ The study held that “television’s portrayal of . . . minorities and the potential impact of these portrayals are issues of critical importance to the American society.”¹⁴² Furthermore, because television affects viewers’ viewpoint, “relations between the races . . . may be affected by television’s limited and often stereotyped portrayals of men and women, both white and nonwhite.”¹⁴³ A study conducted two years later by the Commission concluded that stereotyping continued in the media, intensifying in certain instances.¹⁴⁴

The 1997 Commission report detailed the under-representation

¹³⁷ <http://www.glaad.org>, *supra*, note 135.

¹³⁸ U.S. COMM’N ON CIVIL RIGHTS, *WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES IN TELEVISION*, 4 (1977).

¹³⁹ *Id.*

¹⁴⁰ Gary Williams, “Don’t Try to Adjust Your Television, I’m Black:” *Ruminations on the Recurrent Controversy over the Whiteness of TV*, 4 J. GENDER RACE & JUST. 99, 101 (2000).

¹⁴¹ U.S. Comm’n on Civil Rights, *supra*, note 138 at 4.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ U.S. COMM’N ON CIVIL RIGHTS, *WINDOW DRESSING ON THE SET: AN UPDATE* (1979).

of minorities in the television industry.¹⁴⁵ Out of the 5624 characters on television, 89.1% were Caucasian and 10.9% were non-white.¹⁴⁶ The U.S. population in 1970 was estimated at 83% Caucasian and 17% non-white.¹⁴⁷ In 1998 the Screen Actors Guild continued to find a lack of people of color on television.¹⁴⁸ The increase of African-American roles increased to 13.4%.¹⁴⁹ However, although Latinos comprised 11.2% of the population, they only accounted for 3.5% of the acting roles in that year.¹⁵⁰

In 1999, NAACP President and Chief Executive, Kweisi Mfume threatened filing a claim against the networks under the Communications Act of 1934.¹⁵¹ Mfume argued that broadcasting licenses are held under a public trust and this public trust is violated when television does not fairly represent people of color.¹⁵² After the introduction of the 2001 Fall Primetime shows, Mfume again raised a threat, this time of an economic and advertiser boycott aimed at one of the major television networks.¹⁵³ He accused the four broadcasters of "making little progress in their promises to increase representation of minorities on series and in the executive ranks."¹⁵⁴ The NAACP expressed discouragement by the "snail's pace reaction by some of the networks" after the networks' agreement to improve minority representation in television.¹⁵⁵ The organization has stated it will assess the 2001-02 television season in its progress for diversity before initiating an "economic boycott against a network and its advertisers."¹⁵⁶

¹⁴⁵ U.S. COMM'N ON CIVIL RIGHTS, *supra* note 138, at 4.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See generally <http://www.sag.com/pressreleases/pr-la990503.html>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Greg Braxton, *TV Networks Deny Program "Whitewashing,"* L.A. TIMES, July 13, 1999, at A14.

¹⁵² *Id.*

¹⁵³ Greg Braxton, *NAACP Raises Possibility of Boycott,* L.A. TIMES, August 16, 2001, section 6 at 59.

¹⁵⁴ *Id.*

¹⁵⁵ Pat Nason, *NAACP: Diversity Progress is Slow,* UNITED PRESS INTL., Aug. 15, 2001.

¹⁵⁶ *Id.*

The threat stems from an ongoing campaign by a coalition to pressure networks to change their depictions and representation of minorities on TV.¹⁵⁷ The coalition includes groups representing African-Americans, Hispanics, Asian-Americans and American Indians.¹⁵⁸ The coalition previously secured agreements from the four major networks, which would “increase both the number of minorities on screen as well as development deals with writers and producers.”¹⁵⁹ The coalition released a ‘report card’ to assess the networks’ efforts on the 1999-2000 shows.¹⁶⁰ The coalition’s first report card in November 2000 issued mostly ‘D’s’ for the networks.¹⁶¹

B. Italian-Americans and Media Bias

Currently, Italian Americans are the minority group in the spotlight against media stereotyping. In the past few years, politicians and Italian-American groups have directed legislative and judicial efforts on combating stereotyping of Italians in the media, primarily due to the highly popular HBO series “The Sopranos.”¹⁶²

Congressman Engel’s 1999 and 2001 Acts have not been the only attempts at federally regulating stereotyping in the media. On May 23, 2001, Rep. Roukema (R-N.J.) introduced a concurrent resolution to Congress.¹⁶³ The proposed resolution expressed the sense of Congress that “the entertainment industry should stop the negative and unfair stereotyping of Italian-Americans, and should undertake an initiative to present Italian-Americans in a more balanced and positive manner.”¹⁶⁴ The bill points specifically to the HBO series “The Sopranos” as highly discriminatory in its depic-

¹⁵⁷ Lynn Elber, *Ethnic Groups Condemn TV Networks Over Diversity*, DAYTON DAILY NEWS, May 26, 2001, at 4C, available at LEXIS, Nexis News Group Library.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² H.R. J. Res. 141 107th Cong. (2001), available at <http://thomas.loc.gov>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

tion of Italian-Americans.¹⁶⁵ It points to the Italic Studies Institute study which reviewed all films featuring Italian-Americans made in Hollywood from 1928 to early 2000 finding 73 percent of the films depicted Italians negatively.¹⁶⁶ This was despite data which indicates that only approximately 5,000 people in the United States are involved in organized crime.¹⁶⁷ The study went on to demonstrate that even if 5,000 involved were Italian-Americans, only .0025 percent of all Italian-Americans would be involved in such crime.¹⁶⁸ In proposing this resolution, Rep. Roukema pinpointed "The Sopranos" as "highly discriminatory . . . It's Mafia, homicide, cheating, corruption, denigrating to women and families, all of it."¹⁶⁹

Similar to the public protest against "The Sopranos," a coalition of representatives, including Rep. Engel, and Italian-American organizations protested the released Disney movie "Mafia," a parody of the mob-genre movies, which the coalition claims portrays Italian-Americans in a negative light.¹⁷⁰ The coalition cites a 1996 study by the Commission for Social Justice, the anti-defamation arm of the Sons of Italy.¹⁷¹ The study held that seventy-five percent of Americans think Italian-Americans are involved in organized crime.¹⁷² The coalition argued that movies like "Mafia" perpetuate the negative stereotypes found in the study.¹⁷³ John Calvelli, Rep. Engel's assistant, argued "there have been so many negative portrayals of Italian-Americans, this is just the straw that broke the camel's back."¹⁷⁴

When their protests headed no response from the government, Italian-Americans took things to the next level. In April 2001, the

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ H.R. J. Res. 141 107th Cong. (2001), available at <http://thomas.loc.gov>.

¹⁶⁸ *Id.*

¹⁶⁹ Faye Fiore, *Rep. Roukema Sees Ethnic Insult, Looks to Whack 'The Sopranos'*, L.A. TIMES, May 11, 2001, at A21.

¹⁷⁰ Eamon Javers, *Mob Ties; Members Protest Mafia Movie Image*, THE HILL, July 29, 1998, at 16.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

American Italian Defense Association (AIDA) filed a lawsuit “claiming that the “The Sopranos,” which depicts mob life in suburban New Jersey, violates the ‘Individual Dignity Clause’” Article 1, Section 20 of the Illinois Constitution.¹⁷⁵ The AIDA argued that the fictitious Soprano family fabricates a stereotype of Italian-Americans as “greedy mobsters.”¹⁷⁶ They claimed that such defamation was illegal in Illinois based on the state clause.¹⁷⁷ The clause states: “To promote individual dignity, communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religious, racial, ethnic, national or regional affiliation are condemned.”¹⁷⁸ The AIDA argued that the series should be condemned under the clause and sought a declaratory judgment, but no penalty or injunction.¹⁷⁹ The AIDA filed the lawsuit in Illinois because the Clause is the only one of its kind in the United States.¹⁸⁰

Defendant’s counsel argued that the state clause was advisory and did not intend to make any conduct unlawful.¹⁸¹ However, the AIDA was not claiming that the show or its contents were unlawful, they were merely seeking the judge to issue a declaratory judgment of condemnation.¹⁸² In arguing for the defense, Thomas Yanucci stated that “a courtroom is not the place to argue that a television show uses stereotypes. A finding that the content of the show is unconstitutional would violate the First Amendment.”¹⁸³ Yanucci asked the court “what’s next, The Dukes of Hazzard, Gone With the Wind, The Catcher in the Rye . . . There’s no way you can have artistic expression and expect everyone to like it.”¹⁸⁴

¹⁷⁵ Julia Brunts, *Italian-American Group Seeks to ‘Whack’ Sopranos in Court*, CHICAGO DAILY LAW BULL., Aug. 30, 2001 at p.1.

¹⁷⁶ Gersh Kuntzman, *American Beat: Taking a Whack at Tony Soprano*, NEWSWEEK, Sept. 1, 2001, available at LEXIS, News Library.

¹⁷⁷ *Id.*

¹⁷⁸ IL Const. art. 1, §20.

¹⁷⁹ Brunts, *supra*, note 175 at 1.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

On September 19, 2001, the Cook County judge dismissed the lawsuit.¹⁸⁵ The judge held that “the Sopranos have the constitutional right to sing” and found no showing of injury or a constitutional violation.¹⁸⁶ Michael Polelle, a member of the AIDA said the group would appeal the decision.¹⁸⁷

V. THE IMPACT OF MEDIA BIAS

In terms of the entertainment medium, conventional wisdom implies that individuals can distinguish fact from fiction; that reality can be discriminated from fantasy.¹⁸⁸ However, several studies have negated this wisdom. For example, Prentice, Gerrig, and Ballis conclude from their study that “fiction, like fact, necessitates a willing construction of disbelief; readers will initially accept the assertions in a fictional work as true and will subsequently reject those assertions only if they are motivated to and able to evaluate their veracity.”¹⁸⁹ Hence, television may reinforce existing stereotypes or create new ones if there is no motivation to change their viewpoint. Indeed, watching television usually involves little motivation. In fact, studies have shown that the broadcast media are most effective when they are reinforcing perspectives rather than altering them.¹⁹⁰ Therefore, rather than dispelling beliefs, the continuation of stereotyping certain groups “reinforces ignorance, increases tension and angers already marginalized groups.”¹⁹¹

¹⁸⁵ *Judge Rejects Suit Against ‘Sopranos,’* CHI TRIB., Sept. 20, 2001, at 3.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Sheila T. Murphy, *The Future v. Fact: The Impact of Factual Versus Fictional Media Portrayals on Cultural Stereotypes*, 560 ANNALS AM. ACAD. POL. & SOC. SCI, Nov. 1998 at 170.

¹⁸⁹ *Id.*

¹⁹⁰ Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 40 (1984).

¹⁹¹ *Hollywood Fantasies Dangerous to Reality*, MINN. DAILY, Nov. 11, 1998, available at LEXIS, Nexis Library, News File.

A. Societal Impact (External)

To stereotype is “to impose a trait or characterization that may be true of some members of a group upon all members of the group.”¹⁹² The stereotypical images in the news and media bombard the minds and souls of minorities. Negative stereotypes have the societal effect of accepting the myths without the awareness that they are false. The stereotypes effectively influence discrediting attributes as reality upon Americans.¹⁹³ After years of absorbing these stereotypes, Americans can only perceive what matches their instilled notions of minority ‘reality.’¹⁹⁴ Therefore, Americans think they know how minorities act and live inadvertently through the media.¹⁹⁵

The news industry skews our viewpoints about minorities as well.¹⁹⁶ Our society relies upon television to be informed about local and national events. Television news is a powerful weapon for shaping our political and social issues. A primary concern is whether the issues that minority groups are adequately and fairly discussed in television news.¹⁹⁷ For example, the escalating focus on crime and violence in television news reinforces the black stereotype. One study found local newscasts “over-represent stories about black perpetrators and white victims, and under-represent stories about black victims.”¹⁹⁸

The current legislation proposes to collect, analyze, and prepare information regarding the portrayal of victims of media bias in news programming.¹⁹⁹ It would attempt to provide a closer look at how the news programming influences society with their possibly

¹⁹² Catharine A. McKinnon, *Reflection on Sex Equality Under Law*, 100 YALE L.J. 1281, 1292-3 (1991).

¹⁹³ See, e.g. Sheila T. Murphy, *The Impact of Factual Versus Fictional Media Portrayals on Cultural Stereotypes*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 165, 168 (1998).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Lawrence K. Grossman, *From Bad to Worse: Black Images on “White” News*, COLUM. L. REV., July/Aug. 2001, at 55.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ H.R. 2700, 107th Cong. § 5 (2001), available at <http://thomas.loc.gov>.

skewed viewpoints. Newsmakers influence Americans by legitimizing their own viewpoints and dispelling minority viewpoints.²⁰⁰

Decision-makers in the entertainment world, including producers, directors and casting directors are likely also influenced by the portrayals of minorities in the news. A 1998 Tomas Rivera Policy Institute national survey stated that Latinos are eight times more likely to be portrayed in the news as illegal immigrants, drug runners or gang members than in more positive roles.²⁰¹ Thus, stereotypes may come full circle when the decision-makers of the entertainment world based their decisions on the news industry's legitimized viewpoints.

B. Children

Watching television is the prevalent activity for the average American child.²⁰² For children, television can be a "positive educational tool, or a value-destroying influence."²⁰³ Lois Salisbury, president of Children Now emphasizes that for children, "being included in (television) is a major signal of acceptance, respect and recognition. The absence of cultural images and characters that reflect them . . . is disturbing to kids. It affects their aspirations."²⁰⁴ Studies have concluded that children are especially affected by what they perceive in the media.²⁰⁵ This can have a great effect when children see other minority groups on television more than

²⁰⁰ Sheila T. Murphy, *The Future v. Fact: The Impact of Factual Versus Fictional Media Portrayals on Cultural Stereotypes*, 560 ANNALS AM. ACAD. POL. & SOC. SCI, Nov. 1998 at 170.

²⁰¹ The Tomás Rivera Policy Institute, at <http://www.trpi.org/press/060799.html> (last visited Nov. 1, 2001).

²⁰² People for Better TV (1999), at <http://www.bettertv.org/power.html> (last visited Oct. 23, 2001).

²⁰³ *Id.*

²⁰⁴ Greg Braxton, *TV's Color and Gender Lines, Examined Anew: Television Study Finds That, While Diversity Exists, Primary Casts Remain Mostly White and Male*, L.A. TIMES, Jan. 12, 2000, at F1.

²⁰⁵ Bradley S. Greenberg, *Children's Reactions to TV Blacks*, JOURNALISM Q., Spring 1972, at 11.

reality.²⁰⁶ For example, Dr. Bradley Greenberg's research shows that "forty percent of the white children [in his study] attributed their knowledge about how blacks look, talk, and dress to television. Those white children who had the least opportunity to interact with blacks were most likely to believe that television portrayals of blacks were realistic."²⁰⁷

Studies have shown that because of their social and economic differences, minority children have an even greater exposure to television than Caucasian children.²⁰⁸ This exposure influences how minority children socialize and perceive each other.²⁰⁹ For example, social scientists have studied the influence of television on minority children and found that television has a negative impact on their self-awareness.²¹⁰ One study found that "the exclusion of Blacks from television is destructive to Black children's self-concept because it minimizes the importance of their existence. [T]he television roles in which Blacks are cast communicate to Black children the negative value society places on them."²¹¹

C. Victims of Media Bias (Internal)

Minorities internalize the stories they read, see and hear everyday. A study done by Dr. Cosby revealed that negative television imagery not only influenced non-black Americans to dislike African-Americans, but it influenced African-Americans to dislike themselves.²¹² The perpetuation of negative imagery was hard for minorities to internally resist.²¹³ This negative imagery weighs on minorities' self-esteem and can "impede their ability to realize

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Carolyn A. Stroman, *Television's Role in Socialization of African-American Children and Adolescents*, 60 J. NEGRO EDUC. 314, 315 (1991).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Camille O. Cosby, TELEVISION'S IMAGINABLE INFLUENCES 25 (1994).

²¹³ *Id.*

their personal and academic potential in American society.”²¹⁴ A U.S. Civil Rights Commission study reaffirmed Dr. Cosby’s conclusions, finding that minority stereotypes in the media reinforced negative beliefs, which minorities feel about themselves.²¹⁵

D. Nexus Between Minority Diversity on and off Screen

Diversifying employment, thus empowering more minorities in the industry, would expose the message where the legislation leaves off. After all, ownership carries with it the power to “select, to edit, to choose the methods, manner and emphasis of presentation.”²¹⁶ The owners and employees behind the scenes essentially decide American issues and entertainment values. So knowing this, the question of whether minority ownership would really change what we see on television arises. The proposed legislation would collect and analyze the employment of the ‘victims of media bias.’²¹⁷ However, whether a lack of minority representation behind the scenes if found to be relevant or not, remains to be seen.

The “nexus” theory between minority ownership and employment and minority programming originally gained support from the legislative and judiciary branches.²¹⁸ Minority ownership and employment could diversify television programming.²¹⁹ Before *Adarand* struck down the FCC’s minority requirements, courts upheld minority preferences to promote diverse programming.²²⁰

However, the assumption that an increase in minority ownership leads to an increase in diversity in the media has been chal-

²¹⁴ *Id.*

²¹⁵ MINN. ADVISORY COMM’N TO THE U.S. COMM’N ON CIVIL RIGHTS, STEREOTYPING OF MINORITIES BY THE NEWS MEDIA IN MINNESOTA 35 (1993).

²¹⁶ *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 571 (1990) *overruled in part by Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).

²¹⁷ H.R. 2700, 107th Cong. § 5 (2001), *available at* <http://thomas.loc.gov>.

²¹⁸ Patricia M. Worthy, *Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue*, 18 HASTINGS COMM. & ENT. L.J. 509, 526 (1996).

²¹⁹ *Id.*

²²⁰ *Id.*

lenged.²²¹ In fact, it has been argued that the idea diversity of ownership and employment leads to an enhanced diversity of viewpoint may be racist. In the dissenting opinion of *Metro Broadcasting*, Justice O'Connor criticized the majority for associating a particular viewpoint with race.²²² O'Connor dismissed the FCC for practically identifying what constitutes a 'Black . . . Asian . . . Arab viewpoint,' along with other minority viewpoints.²²³ O'Connor referred to the majority in *Steele* that rejected the assumption that "membership in an ethnic minority causes members of that minority to have distinct tastes and perspectives and that these differences will consciously or unconsciously be reflected in distinctive editorial and entertainment programming."²²⁴

The proposed legislation would collect information and analyze the employment of victims of media bias in the entertainment and news industry.²²⁵ Thus, no requirements or quotas for further racial diversification would be implemented, just awareness.

E. First Amendment Issues

Similar to the 1999 Media Bias proposal, H.R. 2700 does not proscribe any requirement upon broadcasters.²²⁶ However, the current Media Act proposal includes the Savings Provision from infringement on free speech.²²⁷ The provision states that "nothing in [the] Act shall authorize or allow the [FCC] . . . to regulate or otherwise control the content of news or entertainment programming on radio, television, cable television or in print media."²²⁸ Hence, the proposal acknowledges that freedom of expression cannot be tampered with by government regulation.

²²¹ *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 614 (1990) (O'Connor, J., dissenting).

²²² *Id.*

²²³ *Id.*

²²⁴ *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 614 (1990) (O'Connor, J., dissenting) (citing *Steele v. FCC*, 770 F.2d 1192, 1198 (D.C. Cir 1985)).

²²⁵ H.R. 2700, 107th Cong. § 5 (2001), available at <http://thomas.loc.gov>.

²²⁶ H.R. 125, 106th Cong. (1999), available at <http://thomas.loc.gov>.

²²⁷ H.R. 2700, 107th Cong. § 5 (2001), available at <http://thomas.loc.gov>.

²²⁸ *Id.*

The proposed legislation highlights the reality of the industry; that the marketplace of ideas does not allow all viewpoints to be expressed. For example, if one television producer allows minority stereotyping in his sitcom, there is not always another producer, minority or not, with a sitcom powerful enough to cancel out the stereotype. One may argue that minority depictions in the entertainment industry are harmless, after all, it's entertainment. However, entertainment value should not be a valid justification for the obnoxious stereotyping of minority groups.

F. Legislation as Merely Advisory

Informing both the mass media players and consumers of the potential impact of stereotypic representations is a step in the right direction. Historically, the Kerner Commission and the Civil Rights Commission studies, along with media activist groups have highlighted the negative depictions of minority groups.²²⁹ The proposal to the Communications Act would legitimize the government's role in diversifying the media without infringing on free speech.

Some critics may find the proposed legislation as too much governmental interference on the media. They may argue that stereotypes are not prevalent in our day and age. However, it can be argued that it is only in the present that we see the past images as shocking and racist. Therefore the present stereotypes are only recognized as discriminatory years later. "Our much-vaunted system of free expression, with its marketplace of ideas, cannot correct serious systemic ills such as racism or sexism simply because we do not see them as such at the time."²³⁰ Richard Delgado and Jean Stefancic argue that an "effective contemporaneous message" to contradict the negative depiction cannot be adequately en-

²²⁹ U.S. COMM'N ON CIVIL RIGHTS, WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES IN TELEVISION 4 (1997).

²³⁰ Richard Delgado and Jean Stefancic, *Symposium: Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1260 (1992).

acted.²³¹ They argue that a message can only challenge the depiction after our consciousness shifts and society adopts a different narrative.²³² The proposed legislation can create awareness about the news and media industry's depictions of minorities. This awareness can promote society's shift in attitudes about the industries' depictions. The proposed legislation can highlight the stereotypes that are not considered 'stereotypical' to the majority.

For example, when the phrase "Italian Americans" is typed into Time Warner's Internet search box, a glossary of terms from "The Sopranos" appears on the screen with words including "Stugots," "Ginzo gravy" and "Wonder Bread Wop."²³³ These terms are obviously offensive to Italian Americans, but may not scream racism to everyone in present times. The terms and the show exploit certain prejudices about Italian American and allow "the audience to giggle at such images guilt-free."²³⁴

Most likely, years from now, these terms and images of Italian American will seem racist. "In this age of correctness, other groups have managed to banish the worst stereotypes about them. How often these days do you see shuffling blacks, grasping Jews or drunken Irishmen on the screen?"²³⁵ Just as "Shuffling blacks" were did not seem racist during that era, our era does not reject the depictions of Italian-Americans as criminals or Arab-Americans as terrorists. The racism of decades earlier stands out as racist and appears obviously wrong and politically incorrect.²³⁶ However, "we acquiesce in today's version with little realization that it is wrong, that a later generation will ask 'how could they' about

²³¹ *Id.*

²³² *Id.*

²³³ Letter from Frank J. Guarini, NAIF Chairman, to Meryl Marshall, Chairman and CEO, The Academy of Television Arts and Sciences (Sept. 7, 1999), at <http://thomas.loc.gov/cgi-bin/query/C?r106:/temp/~r1065wQ8m> (last visited Nov. 1, 2001).

²³⁴ *Id.*

²³⁵ Clyde Haberman, *An Ethnic Stereotype Hollywood Can't Refuse*, N.Y. TIMES, Jul. 30, 1999.

²³⁶ Richard Delgado & Jean Stefancic, *Symposium: Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1278 (1992).

*us.*²³⁷ The proposed legislation would heighten awareness now, not later.

H.R. 2700 would encourage writers, filmmakers, producers, newsmakers, and other industry players, to feel morally responsible in what they do in the present tense. If media players were pressured by legislation to take responsibility for pigeon-holing minorities now, then society would not have to look back ten years from now and wonder, for example, how HBO got away their persistent, negative portrayals of Italian Americans on television.

The legislation does not infringe upon broadcasters' first amendment rights under the FCC. Furthermore, the legislation does not allow groups to sue for damages. The legislation is merely advisory.²³⁸ It raises the issues and questions regarding the media's depiction of the minorities.²³⁹ The legislation does not demand anything on the media.

There are already a number of minority groups working actively to create awareness of how the media portrays their groups. As such, the legislation may not be completely necessary. As these private groups work with the FCC to collect and analyze information, they will have a greater effect on how they are portrayed in the media. For example, GLAAD is highly active in lobbying the media, including networks and sponsors, to secure "fair, accurate, and inclusive representation . . . in all media."²⁴⁰ They have implemented a "Monitoring and Mobilization" program to promote gays and other minorities as media activists.²⁴¹ Additionally, the National Italian American Foundation has implemented a three-step process on "How to Fight Stereotyping."²⁴²

The media possess the power to change perceptions, if properly encouraged, may change perception of racial prejudices and dis-

²³⁷ *Id.*

²³⁸ H.R. 2700, 107th Cong. § 5 (2001), *available at* <http://thomas.loc.gov>.

²³⁹ *Id.*

²⁴⁰ Gay & Lesbian Alliance Against Defamation, *A Brief Introduction to GLAAD*, *at* <http://www.glaad.org/org/about/index.html?record=65> (last visited Oct. 13, 2001).

²⁴¹ *See id.*

²⁴² The National Italian American Foundation, *at* <http://www.naif.org/media.html> (last visited 11/4/01).

crimination. This power of the law could positively reorder social conceptions of justice, and institute a change in mindset that could result in a decrease in race-based stratification . . . If broadcast media are not encouraged to assess minority issues and continually misrepresent minorities, social distances that perpetuate societal stratification could be exacerbated.²⁴³

But encouragement may not need to come from a federal Act. The most recent meeting among federal and state lawmakers, network executives and minority group leaders shed light on the outcome of the proposed legislation. The members expressed “cautious optimism about the prospects for boosting minority representation on the small screen.”²⁴⁴ This optimism could eliminate the need for any federal legislation regarding their efforts. Rep. David Wu (D-Ore.), a member of the Congressional Asian Pacific American Caucus, advises that the federal government have a “continued oversight” position in overseeing network progress on diversity.²⁴⁵ However, Wu only believes there should be a governmental commitment, not legislation.²⁴⁶ Wu emphasized that congressional legislation is possible but unlikely.²⁴⁷ Any possibility of progress through the joint efforts of the lawmakers, minority groups and the broadcast industry would dispel a need for the legislation.²⁴⁸

VI. CONCLUSION

The media plays a critical role in perpetuating and inventing stereotypes yet has a high level of unrestricted liberties. “With that liberty goes the obligation not to use that freedom to limit the

²⁴³ Kurt Wimmer, *Deregulation and the Market Failure in Minority Programming: The Socioeconomic Dimensions of Broadcast Reform*, 8 COMM/ENT. L.J. 329, 406 (1986).

²⁴⁴ Anuj Gupta and Greg Braxton, *Lawmakers, Networks Discuss TV Diversity; House: Executives and Caucus Members Seek Ways to Boost Minority Representation in the Small-Screen World*, L.A. TIMES, Aug. 1, 2001, at A12.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

freedom, liberty, or advancement opportunity of any racial, ethnic, or religious segment of the community. No differently from individual libel cases, group libel (whether intentional or not) as destructive of a free press.”²⁴⁹ The government has a limited role in regulating the media, especially the content. Engel’s proposed legislation would apparently oversee content without regulation.²⁵⁰ It would advise on programming in entertainment and news and on minority employment. However, the industry and minority groups have recently taken greater measures to spotlight the reality of stereotypes in the industry. While the proposal should be commended, the prospect of it passing is not likely. This proposal is more symbolic than anything. But the symbolic proposal is another positive, aggressive stride in remedying the problem.

Amber McGovern

²⁴⁹ MINN. ADVISORY COMM’N TO THE U.S. COMM’N ON CIVIL RIGHTS, STEREOTYPING OF MINORITIES BY THE NEWS MEDIA IN MINNESOTA 35 (1993).

²⁵⁰ H.R. 2700, 107th Cong. § 5 (2001), available at <http://thomas.loc.gov>.

